FRANCES A. KIBBLE ET AL.

IBLA 85-389 Decided December 9, 1987

Appeals from a decision of the Alaska State Office, Bureau of Land Management, approving land for conveyance to Alaskan Native regional corporation. AA-8104-2.

Appeals dismissed.

1. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance--Alaska Native Claims Settlement Act: Appeals: Standing

An appellant challenging a decision by BLM to approve land for conveyance to a Native Corporation pursuant to sec. 14(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(e) (1982), will be deemed to lack standing under 43 CFR 4.410(b) to pursue the appeal of a BLM determination not to reserve a public easement in the conveyance pursuant to 43 U.S.C. § 1616(b)(1) (1976), where the appellant has failed to identify any property interest in public land or has identified only a property interest in private land which is not adversely affected by the decision.

APPEARANCES: Frances A. Kibble, Alfred A. Roig, Marlene L. Roig, George R. Winingham, William Sutton, Sam F. Lightwood and Charles E. Benjamin, pro sese; F. Christopher Bockmon, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Frances A. Kibble, Alfred A. Roig, Marlene L. Roig, George R. Winingham, William Sutton, Sam F. Lightwood and Charles E. Benjamin have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated January 8, 1985, approving land for conveyance to AHTNA, Inc., an Alaskan Native regional corporation, pursuant to section 14(e) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(e) (1982).

On July 29, 1975, AHTNA, Inc., filed a selection application, AA-8104-2, for approximately 1.2 million acres of land, including a 4.75-acre parcel of land adjacent to Kenny Lake, pursuant to section 12(c) of ANCSA, as amended, 43 U.S.C. § 1611(c) (1982). The 4.75-acre parcel of land, which is the subject of this appeal, is described as lot 9 of U.S. Survey (USS) No. 3579,

situated in sec. 31, T. 1 S., R. 3 E., Copper River Meridian, Alaska, along the Edgerton Highway between mile 23 and 28 from Chitina, Alaska. By Public Land Order (PLO) No. 1497, dated September 9, 1957, the Department had withdrawn, subject to valid existing rights, this parcel of land "from all forms of appropriation under the public land laws, including the mining but not the mineral leasing laws, nor the Act of July 31, 1947 * * * as amended. [30 U.S.C. §§ 601-604 (1982)]." 1/ 22 FR 7363 (Sept. 14, 1957). The land was reserved for administration or transfer in accordance with the Act of May 4, 1956, ch. 234, 70 Stat. 130 (1956), which provided for the construction of public recreational facilities in Alaska. Accordingly, in adjudicating the regional corporation selection application, BLM undertook to determine whether the land in lot 9 of USS No. 3579 should be excluded from conveyance to AHTNA, Inc., pursuant to section 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982). 2/ This case was serialized as AA-50530.

By memorandum dated January 12, 1984, the Chief, Branch of Easement Identification, informed the Chief, Branch of ANCSA Adjudication, that lot 9 of USS No. 3579 was "considered to be public land available for conveyance" because BLM had "never developed or used the site." The January 1985 BLM decision constituted a formal determination that the parcel of land is "considered to be public land." BLM approved the land for conveyance to AHTNA, Inc., because as to that land the selection application was properly filed and

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1/ PLO No. 1497 identified the withdrawn tract as "2.55 acres" of land described by courses and distances. 22 FR 7363 (Sept. 14, 1957). In a February 1, 1962 memorandum, which accompanied transmittal of the final returns for USS No. 3579, the State Director, Alaska, stated that:

"The boundaries of Public Land Order 1497 are defined in this survey as of Lot 9. The location of the shore line of Kenny Lake being different than described in P.L.O. 1497, the area was found to be 4.75 acres instead of 2.55 acres as given in P.L.O. 1497."

The June 18, 1958 "Special Instructions" for the survey had stated that: "An area withdrawn by P.L.O. No. 1497 is also located within this area and will be surveyed as a lot. * * * This lot will necessarily be surveyed as set forth in the Public Land Order." (Emphasis added.) Lot 9 was, therefore, intended to encompass the land withdrawn by PLO No. 1497. However, that land had been described in the PLO in part as from "a point on the shore of Kenny Lake * * * Easterly and southeasterly along the shore of said lake to a point due south of the point of beginning." 22 FR 7363 (Sept. 14, 1957). Apparently, at the time of the survey, which was completed and accepted on March 20, 1962, the lakeshore had shifted, resulting in the increased acreage. Appellant Lightwood reports that "[d]uring the last ten years the water level in Kenny Lake has dropped nearly ten feet." In any case, lot 9 encompasses the land withdrawn by PLO No. 1497.

2/ Section 3(e) of ANCSA defines the term "[p]ublic lands," i.e., those lands which are in part subject to conveyance to an Alaskan Native regional corporation, as "all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation." 43 U.S.C. § 1602(e) (1982).

met the requirements of ANCSA and its implementing regulations. BLM rejected state selection application AA-21216, filed November 14, 1978, to the extent of a conflict. BLM also stated that the land does "not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title." BLM's approval was made subject to valid existing rights. BLM also stated that any party "claiming a property interest in lands affected by this decision" may appeal the BLM decision. Between February 8 and 13, 1985, appellants appealed the January 1985 BLM decision.

The appellants have filed separate statements of reasons in which each explains his or her opposition to the BLM decision to convey lot 9 to AHTNA, Inc. The common basis for their opposition is that lot 9 has been used traditionally by the community to access Kenny Lake and as a site for various community events. 3/ Each appellant expresses the opinion that lot 9 is necessary for public use and access to Kenny Lake. Appellants George R. Winingham and Sam F. Lightwood also challenge the conveyance decision because they allege that it denys them access to their private property. Lightwood and Winingham are the owners respectively of lots 8 and 13 of USS No. 3579. Winingham states that his driveway includes 56 feet of lot 9 and if he is denied access to lot 9 he will have to relocate his driveway at great expense and inconvenience. Lightwood states that he has used lot 9 as an approach to the lake for sole access to his homestead in 1963 and occasionally since then. He explains that he would like this access to remain a permanent option because his land has questionable access to the highway since it was realigned in the mid-1960's.

The crucial question which we must address is whether any appellant has standing to bring an appeal challenging BLM's January 1985 decision approving the 4.75-acre parcel of land for conveyance to AHTNA, Inc. In its answer, the Office of the Regional Solicitor, on behalf of BLM, contends that the appellants lack standing under 43 CFR 4.410(b). That regulation accords standing to appeal in the case of decisions arising under ANCSA to "any party who claims a property interest in land affected by the decision." 43 CFR 4.410(b). Thus, in order to have standing, an appellant must not only claim a property interest but that interest must be affected by the decision appealed from. Walt Hanni, 6 ANCAB 307, 89 I.D. 14 (1982).

In the present case, none of the appellants asserts a property interest in the 4.75-acre parcel of land itself. At best, appellants assert generally that they and other members of the community use lot 9 for community activities, and to gain access to the lake. Sam F. Lightwood and George R. Winingham additionally assert that they use lot 9 to gain access to private

3/ Appellants strongly dispute the statement in the January 1985 BLM decision, at page 2, that lot 9 "has never been used." However, this statement by BLM concerns use solely in connection with administration of a Federal installation, in view of the withdrawal effected by PLO No. 1497, and, thus, relates to the question of whether the land is available for conveyance to AHTNA, Inc., under section 3(e) of ANCSA. BLM did not conclude that the land had never received any use in connection with other public or private activities.

property which substantially surrounds the lake. To the extent that appellants are merely alleging use of lot 9 as members of the public or claiming to represent the public, that would not constitute a claim of property interest required to confer standing. Sierra Club, Alaska Chapter, 79 IBLA 112 (1984).

Nevertheless, we have accorded standing to parties who, while they assert no property interest in the land which BLM seeks to convey to a Native corporation, claim a property interest which would be adversely affected by the failure to reserve a public easement under section 17(b)(1) of ANCSA, 43 U.S.C. § 1616(b)(1) (1976), in the conveyance. Henry W. Waterfield, 77 IBLA 270 (1983). In Waterfield, we held that owners of unpatented mining claims, as well as others holding "property interests in public lands," located outside those lands approved for conveyance have the requisite property interest sufficient to confer standing "[i]f such individuals perceive that their property interests will be adversely affected by BLM's decision not to reserve a public easement across the lands to be conveyed to give access to the remaining public land." Id. at 271. Such individuals are thereby entitled to assert the need for public access to the remaining public land, but not "to the situs of [their] particular interest." Id.

Section 17(b)(1) of ANCSA provided for the identification of public easements across lands selected by regional corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee, inter alia, access for recreation, hunting, transportation, utilities, docks, and other important public uses. In Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977), the court noted that the purpose of such public easements was to provide access across lands selected by the Native corporations to public lands not selected. See also 43 CFR 2650.4-7(a) ("to guarantee access to publicly owned lands"). Thus, the court stated, in explaining the purpose of the statutory provision: "Congress was justifiably concerned that certain portions of the State which were to remain in the public domain would become inaccessible, or landlocked by Native land." (Emphasis added.) Alaska Public Easement Defense Fund v. Andrus, supra at 674.

In its January 1985 decision, BLM concluded that: "There are no easements to be reserved to the United States pursuant to Sec. 17(b) of ANCSA." Nowhere in their statements of reasons for appeal do appellants challenge BLM's decision not to reserve public easements. Nevertheless, even construing appellants' arguments as objecting to BLM's failure to reserve public easements, appellants do not have the requisite property interest sufficient to confer standing to raise those objections. Our decision in Waterfield, recognizing the standing of a mining claimant, was premised on the fact that the claimant was asserting a property interest in public land which would be accessed by a public easement reserved across the lands to be conveyed to the Native corporation. Failure to reserve a public easement in such circumstances would affect access to the public land. A party claiming a property interest in that land would naturally come within the ambit of the purpose that section 17(b)(1) of ANCSA was primarily designed to promote, i.e., providing access to public lands, and,

thus, was entitled to raise objections to the failure to reserve a public easement. We did not hold in Waterfield that a party holding a property interest in any land, public or private, would be accorded standing to object to BLM's failure to reserve a public easement merely because that interest was somehow perceived to be adversely affected.

The Regional Solicitor argues that appellants do not have standing because they have made "no showing of any adverse effect to a property interest," admitting that, for the most part, appellants have the requisite property interest. We agree that most appellants lack standing to the extent that they have not demonstrated that they have a property interest which might be adversely affected by BLM's decision not to reserve public easements.

In the case of an appeal from a decision relating to an ANCSA land selection, an appellant is required to file a statement "of facts upon which the appellant relies for standing under § 4.410(b)," within 30 days after filing its notice of appeal. 43 CFR 4.412(b). Failure to file this statement subjects the appeal to summary dismissal under 43 CFR 4.412(c). The appeals of Marlene L. Roig, Charles E. Benjamin, William Sutton, Frances A. Kibble and Alfred A. Roig are hereby dismissed for that reason because these appellants made no allegations in their statements of reasons which suggest facts upon which they rely for standing.

The only two appellants who have asserted that they have a property interest which might be affected by the conveyance decision are Winingham and Lightwood.

In the case of Winingham, it is clear that he seeks a private right of access to his driveway. Private rights of access are addressed in section 17(b)(2) of ANCSA, 43 U.S.C. § 1616(b)(2) (1976). The proviso of that section expressly provides "that any valid existing right recognized by this chapter shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access." 43 U.S.C. § 1616(b)(2) (1976). Similarly, in proposing regulations with respect to public easements, the Department noted: "Easements solely for private purposes shall not be reserved since they do not fall within the scope of section 17(b) of ANCSA. However, it should be noted that sections 14(g) and 17(b)(2) protect valid existing rights, including those private rights of access which are recognized under existing law." 43 FR 22620 (May 25, 1978). Private parties do not have standing to seek a public easement to access private lands.

In the case of Lightwood, the owner of lot 13 of USS 3579, his most immediate alternative means of access to his property from the Edgerton Highway, other than across lot 9 and then across Kenny Lake, is across lots 10 and 11 of USS No. 3579, and then across Kenny Lake. In a letter dated June 12, 1962, BLM notified the Kenny Lake Community Advancement League that lot 10 of USS No. 3579 had been set aside for public access to Kenny Lake, and that lot 11 of USS No. 3579 would also provide public access. Portions of Right-of-Way file A-064191 attached to the Solicitor's answer show that the State of Alaska obtained a right-of-way in lot 11 from BLM in

1973 which includes a tourist turnout and provides access to Kenny Lake. Lightwood is thus assured access to Kenny Lake. This being the case, we conclude that he does not have a property interest which may be affected by BLM's decision not to reserve a public easement across lot 9.

Appellants generally lack standing under 43 CFR 4.410(b) to object to BLM's January 1985 decision approving lot 9 for conveyance to AHTNA, Inc., where they have asserted no "property interest in land," within the meaning of that regulation, which would be affected in any way by that decision. Their property interest in neighboring or adjacent private land will not suffice. Accordingly, we hereby grant the Regional Solicitor's motion to dismiss the present appeals for lack of standing.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals from the January 1985 BLM decision approving lot 9 for conveyance to AHTNA, Inc., are dismissed.

Gail M. Frazier
Administrative Judge

We concur:

Kathryn A. Lynn
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge